Articles: Welcome relief for carriers facing misdelivery claims

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In a series of recent decisions [illegible] Singapore and the UK have [illegible]ms for misdelivery of cargo deli[illegible] production of an original Bill of Lading in circumstances where those involved consented to unorthodox delivery arrangements.

Whilst Members should continue to exercise utmost caution in this area, these decisions may be seen as welcome relief by carriers facing significant exposures in agreeing to deliver without surrender of a Bill in return for the uncertainty of enforcing rights under Letters of Indemnity (LOIs). It is bad news for banks and others who might be willing to take on bad credit risks feeling protected because they retain the original Bill of Lading.

The *Sienna*

In *The Sienna,* the bank financed the sale of low sulphur fuel oil from BP to a purchaser called Gulf Petrochem. BP initially chartered the vessel, and the charter was subsequently novated to the purchasers, Gulf. Having financed the sale, the bank was to be repaid from the purchase price received from various sub-buyers of parcels of the cargo. The cargo was eventually discharged via two STS transfers without production of the original Bill of Lading.

When the sub-buyers failed to pay the bank, and Gulf became insolvent, the banks sought to issue a claim against the Owners. At the time of delivery BP was the holder of the Bill of Lading, which was subsequently transferred to the bank.

One of the arguments raised as a defence by the carrier was that the Bill of Lading was not the contract of carriage due to the operation of the 'mere receipt rule'. The 'mere receipt rule' says that a Bill of Lading is not evidence of the contract of carriage when the carrier and the holder of the Bill are parties to a charterparty. In those limited circumstances, the contract of carriage is to be found within that charterparty. One of the features of the rule is that, when a Bill of Lading that is a mere receipt is transferred from the charterer to a new holder, it becomes the evidence of the contract of carriage. The

novel question in this case was whether the novation of the charter from BP to Gulf has the same effect and displaces the mere receipt rule.

Having reviewed previous caselaw and academic ed that the claimant had failed to establish that the B evidenced the contract of carriage in spite of the novation and, for this reason, the misdelivery claim failed.

Unfortunately, although the submissions made by the parties are set out in the judgment, the Judge does not explain exactly why she reached this conclusion. It is hard to understand why the mere receipt rule operated in this case to prevent the bank's misdelivery claim.

Whatever the precise legal rationale behind it, the mere receipt rule is a simple and well-established one: as an exception to the principle that once a Bill of Lading is transferred to someone other than the shipper it is conclusive evidence of the contract of carriage, the Bill does not function as the contract of carriage whenever the holder of the Bill is in a direct charterparty relationship with the carrier. It ought not to matter to the functioning of the rule whether the Bill of Lading has found its way into the hands of the charterer by endorsement or whether the charterparty is transferred to the holder of the Bill of Lading by novation (or vice versa).

The decision also raises, but does not address, the difficult question of whether the mere receipt rule is intended to undermine the functioning of a Bill of Lading as a document of title by cutting away the presentation rule.

The bank's claim also failed on the ground that, even if there was a failure to comply with the presentation rule, it did not cause the bank any loss. The carrier successfully argued that the bank had caused its own loss because it authorised delivery to Gulf without presentation of the Bill of Lading. This is a much more solid conclusion since it should not be open to a bank, or anyone else, to paint itself as the innocent victim of the carrier's misdelivery when it is fully aware that cargo is not being delivered against production of an original Bill of Lading.

The *Nika*

In the second case, the *Nika* was carrying wheat from Ukraine to Egypt under many Bills of Lading which were in the hands of the bank.

The vessel discharged cargo without production of the Bills of Lading. The cargo was taken from the warehouse, apparently against the Bills of Lading. When the buyers failed to pay for the cargo, the bank brought a misdelivery claim against the carrier.

The evidence showed that the bank was well aware that the cargo had been released from the warehouse due to daily warehouse stock movement reports and took no steps to stop those cargo releases.

The court concluded the bank's claim was bound to fail because it was fully aware of the scheme whereby cargo was discharged by the carrying vessel into a bonded warehouse without production of the Bills of Lading.

The *Luna*

The Luna concerned fuel supplied to ocean-going vessels from bunker barges off Singapore.

The barge owners issued Bills of Lading after loading from the terminal but delivered into the ocean-going vessels without production of those Bills. After OW Bunkers collapsed, the physical bunker supplier brought a misdelivery claim against the bunker barge owners.

At first instance the Singapore High Court determined that the Bills had contractual force and operated as documents of title. Therefore, cargo had been misdelivered and bunker barge owners were liable.

On appeal that decision was reversed. The Singapore Court of Appeal determined that the Bills were not documents of title and therefore the presentation rule did not apply; the claims against the bunkers suppliers failed. The reasons for this result included the fact that multiple deliveries were made under a single set of Bills, the holder of the Bills was not the only party who dealt with the goods (e.g. someone else gave delivery instructions), the Bills played no role in facilitating the delivery of bunkers to each ocean going vessel and there was no intention to apply the presentation rule.

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